



[BILLING CODE 6760-01-P]

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Parts 1651 and 1690

Implementation of *United States v. Windsor*

AGENCY: Federal Retirement Thrift Investment Board

ACTION: Interim final rule with request for comments.

SUMMARY: The Federal Retirement Thrift Investment Board (FRTIB) is revising its regulations to provide that the FRTIB will look to the laws of the jurisdiction of celebration to determine whether a Thrift Savings Plan participant is married.

DATES: This interim final rule is effective **[Please insert date of publication in the FEDERAL REGISTER]**. Comments should be received on or before **[Please insert date 30 days after date of publication in the FEDERAL REGISTER]**.

ADDRESSES: You may submit comments using one of the following methods:

- Mail: Office of General Counsel, Attn: James B. Petrick, Federal Retirement Thrift Investment Board, 77 K Street, N.E., Washington, D.C. 20002.

- Hand Delivery/Courier: The address for sending comments by hand delivery or courier is the same as that for submitting comments by mail.

- Facsimile: Comments may be submitted by facsimile at (202) 942-1676.

The most helpful comments explain the reason for any recommended change and include data, information, and the authority that supports the recommended change.

FOR FURTHER INFORMATION CONTACT: Laurissa Stokes at (202) 942-1645.

SUPPLEMENTARY INFORMATION: The FRTIB administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401-79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

Section 3 of the Defense of Marriage Act (codified at 1 U.S.C. § 7) provided that, when used in a Federal law, the term "marriage" would mean only a legal union between one man and one woman as husband and wife, and that the term "spouse" referred only to a person of the opposite sex who is a husband or a wife. The U.S. Supreme Court recently held in *United States v. Windsor* that section 3 of the Defense of Marriage Act is

unconstitutional. *Windsor* requires the FRTIB to defer to state law in determining the marital status of TSP participants.

The FRTIB anticipates conflicting state laws. For example, a same-sex couple might get married in a state that permits same-sex marriage and then move to a state that does not recognize same-sex marriages performed in other states or foreign countries. Whether that couple is married for TSP purposes will hinge on whether the FRTIB looks to the laws of the jurisdiction of celebration (*i.e.*, the jurisdiction in which the marriage was initially established) or the laws of the participant's state of domicile.

The TSP has one existing choice-of-law provision pertaining to marriage. It is found in 5 CFR 1651.5(a), and says that the state law of the participant's domicile will be used to determine whether a participant was married for purposes of distributing death benefits from his or her TSP account.

The FRTIB is required by statute to administer the Thrift Savings Plan solely in the interest of its participants and beneficiaries and for the exclusive purposes of (1) providing benefits to participants and their beneficiaries, and (2) defraying the reasonable expenses of administering the Thrift Savings Fund. 5 U.S.C. § 8477(b)(1)(A). Section 1651.5(a) prohibits the FRTIB from offering certain TSP benefits to the same-sex spouses of participants who are domiciled in states

that do not recognize same-sex marriages performed in other states or foreign countries. The current choice-of-law is detrimental to a population of TSP participants and does not serve to defray the expenses of administering the Thrift Savings Fund. Therefore, the FRTIB is revising its regulations to provide that the FRTIB will look to the jurisdiction of celebration to determine a participant's marital status. The FRTIB will adopt a final rule after consideration of public comments on this interim rule.

Interim Final Rule and Request for Comments

Under section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. The FRTIB has determined that immediate action is necessary to allow the FRTIB to implement *United States v. Windsor* in a manner that comports with its statutory obligation to administer the Thrift Savings Plan solely in the interest of its participants and beneficiaries to the extent consistent with Chapter 5 of the United States Code.

The FRTIB encourages public comments on this interim final rule. The FRTIB will adopt a final rule after consideration of public comments on this interim rule.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees and members of the uniformed services who participate in the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan created under the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514, and which is administered by the FRTIB. It will also affect spouses, former spouses, children, or dependents of TSP participants.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501-1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of \$100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under §1532 is not required.

Submission to Congress and the General Accounting Office

Pursuant to 5 U.S.C. 810(a)(1)(A), the FRTIB submitted a

report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before publication of this rule in the Federal Register. This rule is not a major rule as defined at 5 U.S.C. 804(2).

List of Subjects

5 CFR Part 1651

Claims, Government employees, Pensions, Retirement.

5 CFR Part 1690

Government employees, Pensions, Retirement.

Gregory T. Long,

Executive Director,

Federal Retirement Thrift Investment Board

For the reasons stated in the preamble, the FRTIB amends 5 CFR chapter VI as follows:

PART 1651 - DEATH BENEFITS

1. The authority citation for part 1651 continues to read as follows:

AUTHORITY: 5 U.S.C. 8424(d), 8432d, 8432(j), 8433(e), 8435(c)(2), 8474(b)(5) and 8474(c)(1).

§ 1651.1 [Amended]

2. Amend paragraph (b) § 1651.1 to remove the definition of

"domicile."

3. Revise paragraph (a) of § 1651.5 to read as follows:

§ 1651.5 Spouse of participant.

- (a) For purposes of payment under § 1651.2(a)(2) and establishment of beneficiary participant accounts under § 1651.19, the spouse of the participant is the person to whom the participant was married on the date of death. A person is considered to be married even if the parties are separated, unless a court decree of divorce or annulment has been entered. The laws of the jurisdiction in which the marriage was initially established will be used to determine whether the participant was married on the date of death.

PART 1690 - THRIFT SAVINGS PLAN

4. The authority citation for part 1690 continues to read as follows:

AUTHORITY: 5 U.S.C. 8474

5. Revise the definition of "spouse" in § 1690.1 to read as follows:

§ 1690.1 Definitions.

Spouse means the person to whom a TSP participant is married on the date he or she signs a form on which the TSP requests

spousal information. Where a participant is seeking to reclaim an account that has been forfeited pursuant to 5 CFR 1650.16, spouse means the person to whom the participant was married on the withdrawal deadline. For purposes of 5 CFR 1651.5 and 5 CFR 1651.19, spouse means the person to whom the participant was married on the date of the participant's death. A TSP participant is considered to be married even if the parties are separated, unless a court decree of divorce or annulment has been entered. The laws of the jurisdiction in which the marriage was initially established will be used to determine whether a TSP participant is married.

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